A

NORIZAN BAKAR

v.

PANZANA ENTERPRISE SDN BHD

B

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
ZULKEFLI MAKINUDIN CJ (MALAYA)
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
C ZAINUN ALI FCJ
[CIVIL APPEAL NO: 01(F)-29-11-2012(W)]
8 OCTOBER 2013

D ***LABOUR LAW:*** *Industrial Court - Jurisdiction - Whether Industrial Court could substitute own view, in place of employer's view, as to appropriate penalty for employee's misconduct - Whether Industrial Court duty-bound to use doctrine of proportionality of punishment to decide whether misconduct justified dismissal - Whether Industrial Court should take all relevant factors into account before ruling unfair dismissal*

E ***LABOUR LAW:*** *Dismissal - Unfair dismissal - Allegation of - Misconduct - Appellant served on board of directors in another company while in respondent's employment - Whether a breach of respondent company's code of conduct - Whether punishment of dismissal unduly harsh - Whether appellant's dismissal reasonable and fair*

F

The respondent had dismissed the appellant from its employment after the company's domestic inquiry panel found him guilty of four charges of misconduct. Aggrieved over the action, the appellant filed a claim for reinstatement with the Industrial Relations
G Department alleging that his dismissal was without just cause or excuse. Pursuant to s. 20(3) of the Industrial Relations Act 1967 ('IRA'), the Minister concerned referred the matter of the dismissal to the Industrial Court for adjudication. The Industrial Court found that of the four charges that were preferred against the
H appellant, he was only guilty of one *ie*, of breaching the respondent's Code of Conduct in that he failed to declare the fact that he was, at all material times, a director of another company whilst he was in the respondent's employment. The Industrial Court decided that the said misconduct was not serious enough
I to warrant dismissal. As reinstatement was not an appropriate remedy in the circumstances, the court awarded the appellant backwages and compensation *in lieu* of reinstatement. The

respondent applied to the High Court to quash the Industrial Court's award. The High Court dismissed the application, holding that the punishment of dismissal was unduly harsh and was without just cause or excuse considering, *inter alia,* that (i) the respondent was not adversely affected by the fact of the appellant's directorship in another company; (ii) that company was not a competitor to the respondent and was, in fact, dormant; and (iii) the respondent's Code of Conduct was merely a guideline. The respondent appealed against that decision to the Court of Appeal which set aside the High Court's decision and allowed an order of *certiorari* to quash the award of the Industrial Court. The Court of Appeal held that both the Industrial Court and the High Court had erred in their views on the appropriate penalty to be meted out to the appellant; that in considering the reasonableness of what a reasonable employer would have done, no court should substitute its own views, in place of the employer's views, on what should be the appropriate penalty for an employee's misconduct. The appellant obtained leave to file the instant appeal to the Federal Court arguing that the Industrial Court had jurisdiction to consider and evaluate the harshness of an employer's decision to dismiss an employee by applying the doctrine of proportionality of punishment.

Held (dismissing the appeal)
Per Raus Sharif PCA delivering the judgment of the court:

(1) The Industrial Court could substitute its own view, in place of the employer's view, as to what should be the appropriate penalty for an employee's misconduct. The doctrine of proportionality of punishment was inbuilt into the Industrial Relations Act and the Industrial Court was dutybound to decide, using that doctrine, whether a proven misconduct constituted just cause or excuse for dismissal. The Industrial Court had the jurisdiction to decide whether dismissal was too harsh a punishment in the circumstances when ascertaining an award under s. 20(3) of the IRA. (paras 36, 37 & 39)

(2) The Industrial Court had directed its mind only to factors that favoured the appellant, disregarding the very important consideration that the appellant was holding the position of Special Assistant to the respondent's Chairman and the appellant's misconduct had destroyed the trust and confidence which the respondent had placed in him. The appellant was

dishonest and had knowingly made a false declaration that he was not serving on the board of directors of any other company whilst in the respondent's employment when, in fact, he was. Hence, that act was not a minor misconduct given the fact that the appellant had signed and accepted the Code of Conduct. (para 42)

(3) The Industrial Court had failed to direct its mind to all the matters it should have taken into account and, had it done so, it would have concluded that the appellant's dismissal was reasonable and fair. (para 43)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah membuang perayu daripada pekerjaannya selepas satu siasatan domestik syarikat mendapati perayu bersalah atas empat pertuduhan salah laku. Terkilan dengan tindakan itu, perayu memfailkan tuntutan perlantikan semula dengan Jabatan Perhubungan Perusahaan atas dakwaan bahawa pembuangannya telah dibuat tanpa sebab atau alasan yang adil. Menurut s. 20(3) Akta Perhubungan Perusahaan 1967 ('APP'), Menteri berkenaan telah merujuk perkara pembuangan kerja ini ke Mahkamah Perusahaan untuk penghakiman. Mahkamah Perusahaan mendapati bahawa dari empat pertuduhan yang dikenakan terhadap perayu, beliau hanya didapati telah melakukan satu kesalahan, iaitu, melanggar Kod Etika responden kerana kegagalannya mengisytiharkan bahawa beliau pada setiap masa material adalah pengarah sebuah syarikat lain semasa beliau bekerja dengan responden. Mahkamah Perusahaan memutuskan bahawa salah laku tersebut tidak begitu serius untuk mewajarkan pembuangan kerja. Oleh kerana perlantikan semula bukanlah remedi yang sesuai dalam keadaan sedia ada, mahkamah mengawardkan perayu gaji tertunggak dan ganti rugi sebagai ganti perlantikan semula. Responden memohon kepada Mahkamah Tinggi untuk membatalkan award Mahkamah Perusahaan. Mahkamah Tinggi menolak permohonan itu dan memutuskan bahawa hukuman pembuangan kerja adalah terlalu berat dan dibuat tanpa sebab atau alasan yang adil, atas sebab-sebab, antara lain, bahawa (i) responden tidak terjejas oleh kedudukan perayu sebagai pengarah di sebuah syarikat lain; (ii) syarikat itu bukan pesaing kepada responden dan adalah tidak aktif; dan (iii) Kod Etika responden adalah semata-mata satu garis panduan. Responden merayu terhadap keputusan tersebut ke Mahkamah Rayuan yang

telah mengenepikan keputusan Mahkamah Tinggi dan membenarkan perintah *certiorari* untuk membatalkan award Mahkamah Perusahaan. Mahkamah Rayuan memutuskan bahawa kedua-dua Mahkamah Perusahaan dan Mahkamah Tinggi telah khilaf dengan pendapat mereka berkenaan penalti yang sesuai untuk dikenakan terhadap perayu; bahawa dalam mempertimbangkan kewajaran yang harus dilakukan oleh seorang majikan yang wajar, mahkamah tidak sepatutnya memberi pandangan mereka sendiri, dengan menggantikan pendapat majikan, pada apa yang sepatutnya menjadi penalti yang sesuai bagi salah laku seorang pekerja. Perayu memperolehi kebenaran untuk memfailkan rayuan ini ke Mahkamah Persekutuan dengan berhujah bahawa Mahkamah Perusahaan mempunyai bidangkuasa untuk mempertimbangkan dan menilai kekerasan keputusan majikan untuk membuang pekerja dengan menggunakan doktrin kesepadanan hukuman.

Diputuskan (menolak rayuan)
Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Perusahaan boleh memberikan pendapatnya sendiri, dengan menggantikan pendapat majikan, berkenaan penalti yang sesuai bagi salah laku pekerja. Doktrin kesepadanan hukuman terbina dalam Akta Perhubungan Perusahaan dan Mahkamah Perusahaan adalah berkewajipan untuk membuat keputusan, dengan menggunakan doktrin tersebut, sama ada salah laku yang telah dibuktikan merupakan sebab atau alasan yang adil untuk pembuangan. Mahkamah Perusahaan mempunyai bidangkuasa untuk memutuskan sama ada pembuangan kerja adalah hukuman yang terlalu berat dalam keadaan apabila menentukan award di bawah s. 20(3) APP.

(2) Mahkamah Perusahaan telah mengarahkan mindanya kepada faktor-faktor yang memihak kepada perayu, dan telah mengabaikan pertimbangan yang sangat penting bahawa perayu memegang jawatan Pembantu Khas kepada Pengerusi responden dan tindakan perayu telah memusnahkan kepercayaan dan keyakinan yang responden telah letakkan ke atasnya. Perayu tidak jujur dan telah sengaja membuat pengakuan palsu bahawa beliau tidak berkhidmat dalam lembaga pengarah syarikat lain semasa bekerja dengan responden, sedangkan itu yang dilakukan olehnya. Maka,

A tindakan tersebut bukanlah satu salah laku yang kecil memandangkan perayu telah menandatangani dan menerima Kod Etika.

(3) Mahkamah Perusahaan gagal mengarahkan mindanya kepada
B semua perkara yang harus diambil dalam pertimbangan dan, sekiranya ia berbuat demikian, ia akan membuat kesimpulan bahawa pembuangan perayu adalah munasabah dan adil.

Case(s) referred to:

Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 CA ***(refd)***
C
British Leyland UK Ltd v. Swift [1981] IRLR 91 ***(refd)***
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***
NC Watling & Co Ltd v. Richardson [1978] ICR 1049 ***(refd)***
Ng Hock Chen v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***
D *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC* ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
E *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba [1998] 3 CLJ 288 CA* ***(refd)***
Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***
F

Legislation referred to:

Criminal Procedure Code, s. 173A(ii)(b)
Employment Act 1955, s. 14(1)
Federal Constitution, arts. 132, 135
G Industrial Relations Act 1967, ss. 20(1), (3), 30(5), (6)
Penal Code, s. 409
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980, O. 4(2)(d), O. 33, O. 35(1), O. 36

Employment Protection (Consolidation) Act 1978 [UK], s. 57(3)
H

For the appellant - VK Raj (Ravindra Murugavell, Mohan Ramakrishnan, Arun Kumar, Ramdhari JBS, Chandra Segaran, R P Vickneswaren, Muhendaran Suppiah & Sunil Vijayan with him); M/s Murugavell Arumugam & Co
For the respondent - A Ramadass (M Jothiletchimy with him); M/s Ramadass I *& Assocs*

[Editor's note: For the Court of Appeal judgment, please see Panzana Enterprise Sdn Bhd v. Norizan Bakar & Anor [2012] 7 CLJ 137.]

Reported by Ashok Kumar

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This is an appeal by the appellant against the decision of the Court of Appeal given on 10 February 2012 in allowing the respondent's appeal against the decision of the High Court. The High Court had earlier on 31 March 2009 dismissed the respondent's application for judicial review to quash the Industrial Court's Award No. 154 of 2006 dated 5 January 2006.

[2] On 22 October 2012, the Federal Court granted the appellant leave to appeal on the following questions of law, namely:

(i) Whether the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and/or that the punishment of dismissal was too harsh in the circumstances, when handing down an award under s. 20(3) of the Industrial Relations Act 1967.

(ii) Further and/or in the alternative, whether the Industrial Court in exercising its functions as stated in the paragraph above can rely to its powers under s. 30(5) of the Industrial Relations Act 1967 specifically based on the principle of equity, good conscience and substantial merits of the case.

Background Facts

[3] This is a case where the appellant, an employee of the respondent, after a domestic inquiry was dismissed from his employment by the respondent when he was found guilty of four charges of misconduct. The allegation of misconduct levelled against the appellant was that he (the appellant) had falsely declared in writing in breach of the respondent company's code of conduct that he was not serving on the board of directors of

any other company when he was at all material times found to be serving on the board of directors of another company. The salient facts leading to the appellant's dismissal are these: The appellant commenced employment with the respondent company on 19 September 1994 as an Assistant Manager. He was promoted to the position of manager on 1 May 1995 and later as the personal assistant to the respondent's Chairman on 10 April 1999. On 29 October 1999, the respondent issued a show cause letter to the appellant wherein the appellant was asked to explain the four allegations of misconduct levelled against him. The appellant replied to the show cause letter on 1 November 1999. The respondent was not satisfied with the appellant's explanation and issued a notice to the appellant to attend a domestic inquiry on 10 November 1999 to answer the four charges of misconduct preferred against him. The relevant charges read as follows:

1st Charge

You, knowingly and deliberately did not comply with the company's procedure on leaving the office premises during office hours, by not recording your absence from office during office hours, in the "leaving office premises during office hours register" maintained at the reception area.

Records in the register with effect from 10th February 1999 to 25th October 1999 and your response to the numerous queries raised by the Human Resource & Administration Department with regard to your absence from office, confirms that you have not complied with the said procedure.

2nd Charge

On 19 October 1999, you committed an act of Gross Insubordination by relinquishing your position as Personal Assistant to the Chairman, by writing a note to the Chairman's Executive Assistant, stating that you no longer work for the Chairman. In your note, you also implied that you have abandoned three assignments that were entrusted to you by the Chairman.

3rd Charge

On 15 July 1999, you committed an act of dishonesty and breach of trust placed upon you as Personal Assistant to the Chairman, by taking without approval or permission from the Chairman, one (1) badminton racket from the Chairman's contribution of five (5) rackets from the Chairman's contribution of five (5) badminton rackets to Panzana's Sports Club.

4th Charge

Despite signing Panzana's Code of Conduct for employees on 29th November 1997, you breached point No. 1 of the code, by not disclosing and obtaining written approval from the Group Chief Executive Officer, of your direct interest as Director of NK Media Sdn Bhd.

[4] The domestic inquiry panel found the appellant guilty of all four charges. He was dismissed by the respondent from his employment. Being dissatisfied with his dismissal, the appellant filed a claim for reinstatement with the industrial relations department under s. 20 of the Industrial Relations Act 1967 ("IRA"). When reconciliation process before the industrial relation department failed, the Honourable Minister of human resources acting under s. 20(3) of the IRA referred the matter to the Industrial Court for a decision.

At The Industrial Court

[5] The Industrial Court after a full trial handed down its award on 5 January 2006. The Industrial Court found the appellant not guilty of the first three charges, but found him guilty of the 4th charge. However, the Industrial Court was of the opinion that the appellant's misconduct was only minor, which did not warrant a dismissal. The Industrial Court was of the view that reinstatement was not the right remedy and, therefore, ordered back wages and compensation *in lieu* of reinstatement. The Industrial Court also ordered 30% liability on the part of the appellant for his misconduct. In consequence, the respondent was ordered to pay the sum of RM109,000 being backwages for 24 months after deducting 30% for appellant's misconduct and compensation *in lieu* of reinstatement of RM39,000 (one month wages for every year served). The relevant part of the Industrial Court's decision which merits reproduction are as follows:

The Claimant was certainly guilty of charge 4 as he was the Director of NK Media Sdn Bhd prior to signing of the Code of Conduct on 29th November 1997. The Claimant's contention that it was a genuine oversight on his part is not true. He has committed misconduct. However this misconduct alone is not sufficient to dismiss the Claimant. This Court considers the Claimant's misconduct as a minor misconduct which does not warrant the Company to dismiss him. NK Media Sdn Bhd is a

family business. It is not a competitive Company to the Panzana Group of Companies which involves in construction. The claimant's Company was only dealing with general trading. This piece of evidence was not rebutted by the Company. Moreover at that point in time NK Media Sdn Bhd was dormant. This piece of evidence was also not rebutted.

For the above said reasons, this court comes to the conclusion that though the Claimant had committed misconduct, it was only minor in nature and it doesn't warrant dismissal.

Perusing through the evidence of all the witnesses and the documents submitted before this Court, this Court comes to the conclusion that the dismissal of the Claimant is without just cause or excuse.

Reinstatement is not the right remedy in this case. This Court therefore orders backwages and compensation *in lieu* of reinstatement. This Court also orders 30% liability on the part of the Claimant for his misconduct.

At The High Court

[6] Dissatisfied with the award handed down by the Industrial Court, the respondent filed an application for judicial review in the High Court seeking an order for *certiorari* to quash and set aside the Industrial Court Award. The High Court in dismissing the respondent's application for judicial review found that the Industrial Court did not commit any error of law and that there was no jurisdictional error on the part of the Industrial Court which would merit interference by an order of *certiorari*. The High Court found that the dismissal of the appellant by the respondent was unduly harsh and without just cause or excuse taking into consideration the following:

(i) the interest of the respondent was not affected in the appellant being the director of NK Media Sdn Bhd;

(ii) the respondent's company and NK Media Sdn Bhd has no link with each other and NK Media Sdn Bhd was not a competitor company;

(iii) the code of conduct imposed by the respondent company is only a guideline;

(iv) NK Media was a dormant company; and

(v) The respondent was not affected in any way in the appellant being the director of NK Media.

At The Court Of Appeal

[7] Aggrieved by the High Court decision the respondent lodged an appeal to the Court of Appeal. The Court of Appeal allowed the respondent's appeal and accordingly set aside the decision of the High Court. The respondent's application for an order of *certiorari* to quash the Industrial Court's award was, therefore, allowed. The Court of Appeal was of the view that:

> In an application for judicial review, the Industrial Court and indeed the High Court are concerned with the application of procedural fairness in relation to the decision-making process and not the decision itself. *Tan Teck Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 CA. In considering the reasonableness of what a reasonable employer would have done, the Court (whether Industrial Court, High Court or Court of Appeal) must not substitute its own views (as what the appropriate penalty for the employee's conduct) for the view of the employer concerned. We hold that the Industrial Court and the High Court had erred in substituting their own views (on the appropriate penalty) for the views of the Employer.

Submissions

[8] The thrust of the appellant's submission before us was that the Court of Appeal misdirected itself in law and fact, when it held that the Industrial Court, High Court or the Court of Appeal must not substitute its own views as to what is the appropriate penalty for the employee's conduct for the view of the employer concerned. It is the appellant's bone of contention that the Industrial Court is fully endowed with the jurisdiction to consider and evaluate the harshness of the employer's decision to dismiss the employee through the doctrine of proportionality of punishment. (see s. 20 of the IRA; item 5 of the 2nd Schedule to the IRA and Federal Court case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537).

[9] Premised on the above learned counsel submitted that the Court of Appeal in deciding whether the dismissal of an employee is right in law had erred in placing its reliance on the minority decision of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan &*

Anor [1996] 2 CLJ 771 which was cited with approval and followed in the Federal Court case of *Ng Hock Chen v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405. Learned counsel strenuously argued that the minority decision of *Tan Teck Seng* was based on the "reasonable employer" test based on s. 57(3) of the Employment Protection (Consolidation) Act 1978 (UK) which was propounded in the English case of *British Leyland UK Ltd v. Swift* [1981] IRLR 91 which is alien to our local industrial law jurisprudence. Learned counsel submitted that rightfully s. 20(1) of the IRA 1967 is more applicable in determining whether the dismissal of an employee is right in law.

[10] Learned counsel for the respondent conversely submitted that the appellant had clearly misconstrued the findings of the Court of Appeal in *Tan Teck Seng* and the principles laid down thereunder. Learned counsel submitted that the correct test based on the case of *Tan Teck Seng* was whether it would be reasonable for the appellant's employers to dismiss him on the facts and circumstances of the case. Put simply, whether what has been done by the employer is something that no reasonable management would have done. Applying this test to the present case, learned counsel submitted that it was reasonable for the respondent to dismiss the appellant since it was clearly stipulated in the code of conduct which was signed and accepted by the appellant that he shall not be involved in any other company except with the express approval from the respondent.

[11] Given that the appellant did breach the aforesaid code of conduct, learned counsel for the respondent submitted that the Court of Appeal did not commit any error in its finding that the appellant's dismissal was reasonable.

Issues And Findings

[12] At the outset we would like to state here that the judgment of the Court of Appeal in the present case is a mirror of the dissenting judgment of NH Chan, JCA in *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 ("Tan Teck Seng") where His Lordship held:

> When considering the reasonableness of what a reasonable employer would have done, the court (whether it be the High Court, Court of Appeal or, the Industrial Court) must not substitute its own views as to what was the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

[13] In *Tan Teck Seng*, the appellant ("Tan") was a senior assistant attached to a primary school in Johor. He was charged before the Sessions Court with two counts of criminal breach of trust under s. 409 of the Penal Code. He was convicted and sentenced to six months imprisonment. He appealed to the High Court at Muar. The High Court affirmed the finding of guilt but set aside the conviction and sentence, and in place of that made an order that Tan be bound over to be of good behaviour for three years in the sum RM5,000 without surety under s. 173A(ii)(b) of the Criminal Procedure Code.

[14] Disciplinary action was taken against Tan. It was recommended by the Johor education department that Tan be reduced in rank and salary pursuant to General Orders O. 36 of the Public Officers (Conduct and Discipline) (Chapter D) 1980 ("General Orders 1980"). Notwithstanding the recommendation, the disciplinary authority treated the order of the Muar High Court as a conviction against Tan, as well as took it that Tan had conducted himself "in such manner as to bring the public service into disrepute" contrary to General O. 4(2)(d) of the General Orders 1980. As a result, the disciplinary authority acting under General Orders O. 33 and O. 35(1) dismissed Tan from the service.

[15] Dissatisfied with the decision of the disciplinary authority, Tan instituted a writ action in the High Court Johor Bahru, seeking a declaration that his dismissal was null and void. The High Court *inter alia* took the view that conviction was tantamount to Tan conducting himself in such manner as to bring the public service into disrepute contrary to General O. 4(2)(d), and so confirmed the dismissal as being legitimate and effected according to law. Before the Court of Appeal, one of the primary question which arose was: whether the punishment of dismissal as imposed was proportional to the misconduct found to have been committed by Tan and if not, whether a lesser punishment ought to be opted for. Gopal Sri Ram JCA (as he then was) speaking for the majority held that the order of dismissal was too severe a punishment to be imposed on Tan. The order of dismissal was replaced with an order that the appellant be reduced in rank in a manner as proposed by the Johor education department.

[16] His Lordship NH Chan, JCA dissented. His Lordship in his dissenting judgment stated that the correct test to be adopted by the Court of Appeal on an appeal or the High Court on the

original hearing is to determine whether, it was reasonable for the disciplinary authority to dismiss Tan on those facts. In laying down the foundation for such a test, His Lordship adopted the words of Philips J in the case of *NC Watling & Co Ltd v. Richardson* [1978] ICR 1049. His Lordship had this to say:

> It is not for this Court on an appeal, nor for any other Court on the original hearing, to decide whether it would have dismissed on those facts. I think the correct test for this Court on an appeal or for the High Court on the original hearing is to determine whether it was reasonable for the appellant's employers to dismiss him on those facts. I gratefully adopt the words of Phillips J in *NC Watling & Co Ltd v. Richardson* [1978] ICR 1049 at pp. 1056 and 1057:
>
> > ... the industrial tribunal, while using its own collective wisdom is to apply the standard of the reasonable employer; that is to say, the fairness or unfairness of the dismissal is to be judged not by the hunch of the particular tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved.
> >
> > It has to be recognized that there are circumstances where more than one course of action may be reasonable.

[17] His Lordship NH Chan in stating his views aforesaid stood guided by the reasonable employer's test as propounded by the English authorities and in particular the English Court of Appeal's decision in *British Leyland UK Ltd v. Swift* [1981] IRLR 91. In British Leyland, one Mr Swift was dismissed after 18 years' service with the company after a road fund licence (tax disc) belonging to the company's Land Rover was found on Mr Swift own vehicle. When asked by the police about the matter, Mr Swift said he had found the tax disc outside the factory. He was charged with theft of the tax disc. Before the Magistrate, he pleaded not guilty to theft but guilty to fraudulently using the tax disc. He was convicted and fined £30.

[18] Mr Swift's conviction came to the knowledge of the company and an investigation was carried out. Mr Swift then maintained that he had lent his vehicle to a friend on the understanding that the friend would have the vehicle taxed and

tested before he used it. When the vehicle was returned to him, the tax disc was in position and he had no idea that it was false. Following an investigation, Mr Swift was dismissed.

[19] Mr Swift took the case before the English industrial tribunal, and his complaint was his dismissal was unfair. The industrial tribunal held that "there was abundant evidence available on which any reasonable employer would have come to the conclusion that the applicant had been guilty of gross misconduct". However, the industrial tribunal went on to find that the dismissal was unfair. According to the industrial tribunal, given Mr Swift's previous work record, dismissal was too severe a penalty for what they saw was a relatively minor offence which had already been dealt with by the Magistrate. And they pointed that Mr Swift was not employed in a fiduciary capacity. However, the industrial tribunal did find that Mr Swift was three-quarters to blame and the compensation was accordingly reduced by 75% on the grounds of contributory fault.

[20] The decision of industrial tribunal was upheld on appeal on a majority decision by the employment appeal tribunal. However, on further appeal by the company, the English Court of Appeal allowed the appeal and substituted the finding that the dismissal was fair. Lord Denning MR gave the following reasons:

> The first question that arises is whether the Industrial Tribunal applied the wrong test. We have had considerable argument about it. They said: '... a reasonable employer would, in our opinion, have considered that a lesser penalty was appropriate'. I do not think that that is the right test. The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.

But there is a further point. It is whether the Industrial Tribunal took into account all relevant considerations. It seems to me that they failed to take into account the conduct of Mr Swift after the offence was discovered. He did not come forward and say, 'I am sorry; I made a mistake. I ought not to have done it. I will not do anything of the kind again'. He did not even tell the same story he told the police officer. He put forward a 'cock and bull' story about his having lent his Land Rover to another man: and the other man had got the tax disc: and it was the other man's fault: and so forth. As to that, the Industrial Tribunal were quite outspoken. They said: 'It is flying in the face of probability to suggest that he and Mr Rawlins were giving a truthful and accurate account'. So there it is. Mr Swift did not 'come clean' when he was found out. He put forward a wholly untruthful account. That seems to me to be a most relevant consideration for the employers to take into account in deciding whether it was reasonable to dismiss him or not. But there is not a word about it in paragraph 12 when they set out their reasons. On the contrary, the offence was mentioned as being 'a relatively minor one'. They refer to it almost as if he had paid the penalty and ought not to be penalised for it any more. That was the wrong approach. If a man is convicted and fined, it is a ground for dismissing him and not for keeping him on.

The Employment Appeal Tribunal were very troubled about the case. They said:

> 'We have thought, all of us, deeply, carefully and long over this case, which must come very near the borderline. Had we been the Industrial Tribunal who had to exercise the function which it exercised in this case, it seems highly likely that we would have decided the case in the opposite sense. One of our number is wholly convinced by the reasoning which is put forward on behalf of the employers, that this is a perverse decision; that an employer, in particular a motor manufacturer, faced with these circumstances, must, in view of the finding of gross misconduct or gross dishonesty, have had available to him, while acting reasonably, at any rate an available option of dismissal. The other two of us, while far from being convinced by the reasoning of the Tribunal, have not found it possible to come to the conclusion that the Tribunal acted perversely …'

Now it comes to us. It is my opinion that the Industrial Tribunal failed to take into account the conduct of Mr Swift when he was tackled with this offence. That is a very relevant consideration, which would influence any reasonable employer. I am not prepared to say that no reasonable employer would have dismissed him in the circumstance. On the contrary, it seems to me that many a reasonable employer in the circumstances would have thought it right to dismiss him.

I would therefore allow the appeal and hold that the dismissal was fair and not unfair.

[21] Lord Justice Ackner in the supporting judgment gave the following reasons:

What then accounts for this surprising decision – to put it bluntly – that no reasonable employer would have dismissed a person not only guilty of gross dishonesty, but a person who persistently and unrepentantly sought to lie his way out of that offence? The explanation is to be found in one paragraph, paragraph 12, where the Tribunal say:

> The offence was a relatively minor one for which he has already been dealt with in the Magistrates Courts so far as the criminal aspect is concerned Mr Swift is not employed in a fiduciary capacity. There is no evidence that they have suffered in any way as a result of this lapse in the interval between the conviction and it being brought to their notice. The penalty should obviously be related to the offence and we consider that the employers have over-reacted.

It seems to me quite clear that in justifying their surprising conclusion, to which I have referred, they have confined their attention to the offence, and they have not done that wholly accurately; because the offence, which they say was dealt with by the magistrates, was an offence based upon an assertion of fact which neither the employers nor the Tribunal accepted as being correct. He knew that it was the company's disc, and that was not put before the magistrates. But what is much more important is that they leave out of account his subsequent behavior. The apparent justification for leaving that out seems to be found in the phrase, 'Mr Swift is not employed in a fiduciary capacity'. But it is a truism that trust is one of the important foundations of the relationship between master and servant; and, in my judgment, to have confined their attention to the offence and not to his conduct subsequent to the offence, was a misdirection. It is clear that the

A Tribunal itself thought that the matter was close to the borderline because they concluded that the applicant was largely responsible for his own down fall, and that was why they reduced his compensation by 75%. If they had taken into account the subsequent conduct, I feel sure they would have reached another
B conclusion – a conclusion that a reasonable employer had at least the option to dismiss an employee in these circumstances, if the employer were so minded.

[22] Lord Justice Griffiths who also wrote a supporting judgment had this to say:

C

Unwilling to think that an Industrial Tribunal would be perverse, I ask myself, how did they come to this rather astonishing conclusion? For myself, I agree, for the reasons given by my Lord the Master of the Rolls and Lord Justice Ackner, that the answer is to be found in the fact that, when they came to
D consider the fairness or otherwise of the dismissal, they appear to have concentrated exclusively on the mitigating factors affecting the employee, and entirely disregarded the very serious breakdown in trust which must have arisen from this employee persisting in a lying explanation of his conduct.

E

Accordingly I agree that this Industrial Tribunal did not direct its mind to all the matters it should have taken into account; and I am convinced that, had they had those factors in mind, they could not have concluded that an employer who had the option of dismissal open to him acted unfairly in the circumstances of
F this case. Accordingly I too think that this appeal should be allowed.

[23] Clearly from the above, the English Court of Appeal did not rule that the industrial tribunal or employment appeal tribunal cannot interfere with the decision of the company in dismissing
G Mr Swift. No doubt they had come out with the reasonable employer's test, but what concerned them most was that on the facts and circumstances, their Lordships were astonished as to how the industrial tribunal had come to a decision that the
H dismissal of Mr Swift was unfair, overlooking the vital aspects surrounding the dismissal. The industrial tribunal in considering the fairness or otherwise of the dismissal of Mr Swift had appeared to have concentrated exclusively on the mitigating factor affecting Mr Swift's dismissal and entirely disregarding the very serious
I breakdown in trust which must have arisen from Mr Swift's persistence in a lying explanation of his conduct. The Court of

Appeal pointed out that the industrial tribunal had failed to direct its mind to all matters it should have taken into account, and their Lordships were convinced that had it done so it would have concluded that the dismissal of Mr Swift by the company was fair.

[24] It was on those facts and circumstances that the "reasonable employer's test" was propounded in British Leyland and later it found its way in the dissenting judgment of NH Chan, JCA in *Tan Teck Seng*. The dissenting judgment of His Lordship NH Chan in *Tan Teck Seng* was cited with approval by the Federal Court in *Ng Hock Chen v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 *("Ng Hock Cheng")*.

[25] In *Ng Hock Cheng*'s case, the appellant ("Ng") was a chief storekeeper of the prisons department at Kamunting in Taiping. As it transpired, Ng had incurred heavy debts and was therefore liable to disciplinary proceedings under the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. After considering Ng's representations, the Public Service Commission dismissed him. Before the High Court, Ng's primary contention was that the punishment meted out by the Public Service Commission was too severe and that he should have been given a punishment lesser than a dismissal. The question of law raised in the appeal was whether the courts have the power to interfere with the punishment meted out by the Public Service Commission. The Federal Court answered the question in the negative and with the decision took the opportunity in affirming the dissenting judgment of NH Chan in *Tan Teck Seng* in the following words:

> The test is not what the Court of Appeal or the High Court thinks should be the appropriate penalty. Whether dismissal or a lesser penalty (like a reduction in rank) was appropriate is not for the court to say. The court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

[26] There is no dispute that the above two cases involved public servants and disciplinary procedures relating to them. It can also be no dispute that by operation of arts. 135 and 132 of the Federal Constitution, a public servant who wishes to challenge any allegation of misconduct against him, for which punishment has been imposed, can only do so by challenging it in the High Court by way of judicial review. The said public servant cannot challenge the punishment imposed, but only on the allegations preferred

against him. The right of public officers to challenge any disciplinary action against them is well explained by Peh Swee Chin FCJ in *Ng Hock Cheng* which are as follows:

> A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art. 135 of the Federal Constitution providing that no member of such service shall be dismissed or reduced in rank except: (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure provided therefore, see *Mohd bin Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361.

[27] Peh Swee Chin FCJ further explained why the court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned. His Lordship stated that:

> If the public officer succeeds in so impugning, any order of punishment including an order of dismissal can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.

[28] *Tan Teck Seng* and *Ng Hock Cheng* are both cases involving dismissal of a public sector employee. There is a stark contrast between the rights of an employee in a public sector and an employee under the private sector in Malaysia when dealing with an unlawful dismissal. In the latter scenario, the employee's rights after the dismissal is governed by s. 20 of the IRA. Under the scheme of this provision the Industrial Court is clothed with powers to consider whether the misconduct if proved warrants the punishment of dismissal or otherwise. This powers of the Industrial Court has been clearly elucidated by the Federal Court in *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753 ("Hong Leong Assurance") and *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449; [1995] 3 MLJ 537 ("Milan Auto").

[29] In *Hong Leong Assurance*, the appellant ("Wong"), an insurance claims manager in the employment of the respondent ("the company"), had been dismissed on the ground that he had misconducted himself by selling motor car wrecks, which was against the rules of the company. *Wong*'s case was referred by the Minister to the Industrial Court for a decision. Without considering whether Wong's misconduct could constitute sufficient cause or excuse for his dismissal, the Industrial Court concluded that Wong's dismissal was wrongful on the procedural ground that he had not been given a right to be heard at any domestic inquiry, contrary to the terms of his employment contract. The Industrial Court awarded Wong compensation *in lieu* of reinstatement but reduced the quantum because of Wong's misconduct. The company was aggrieved by the whole award, whilst Wong was dissatisfied with the reduced compensation. They applied to the High Court for an order of *certiorari* to quash the award but both applications were dismissed. They appealed to the Federal Court.

[30] The Federal Court in dismissing Wong's appeal and allowing the company's appeal had clearly indicated that "in exercising judicial review, the High Court was obliged not to interfere with the findings of the Industrial Court unless they were found to be unreasonable, in the sense that no reasonable man could reasonably come to the conclusion. In this case, it was perfectly justified for the Industrial Court to take into consideration Wong's misconduct as a contributory factor towards the assessment of compensation. It was not only consistent with s. 30(5) of the IRA which requires the Industrial Court to act according to equity and good conscience, but it would discourage unfair trade practices by motor insurance executives.

[31] Almost similar facts occurred in the case of *Milan Auto*. There, the respondent ("SY Wong") was a mechanic for the appellant ("the company"). SY Wong was dismissed by the company from work, alleging that he was undisciplined, unproductive and arrogant as he had on several occasions slept during office hours, taken leave without approval, and refused to see the operations manager when requested to do so. Following from a representation by SY Wong that he had been dismissed without just cause or excuse, the Minister referred the matter to the Industrial Court.

[32] The Industrial Court decided in favour of SY Wong, solely on the ground that the company was in breach of the statutory requirement of "due inquiry" before dismissal under s. 14(1) of the Employment Act 1955 and failure to hold an inquiry before dismissing SY Wong. The Industrial Court was of the view that those factors were sufficient to constitute a dismissal without just cause or excuse, and it was unnecessary to determine whether the alleged misconduct if established, constitute a just cause or excuse for dismissal. The company's application to the High Court to quash the award was dismissed.

[33] Mohamad Azmi FCJ, again speaking for the Federal Court, in allowing the company's appeal repeated what he had said in *Wong Yuen Hock* by stating:

> As pointed out by this Court recently in *Wong Yuen Hock v. Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on reference under s. 20 is twofold, first, to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitute just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by *certiorari* by the High Court.

[34] This point has been made earlier but deserves to be reiterated. A public officer who wishes to challenge any allegation of misconduct against him for which punishment has been imposed can only do so by challenging it in the High Court by way of judicial review. It is pertinent to note that the said public officer cannot challenge the punishment imposed, but only the allegations preferred against him. This clearly explains why the court must not substitute its own view as to what is the appropriate penalty for public officer's misconduct, for the view of the particular disciplinary committee as rightly held by the minority view in *Tan Teck Seng* and the Federal Court in *Ng Hock Cheng*.

[35] However, the same cannot be true with regard to the dismissal cases involving private sector employees. Any complaint of unfair dismissal by an employee has to be dealt with under the IRA. The duty of the Industrial Court in dealing with such cases had been laid down in *Hong Leong Assurance* and *Milan Auto*, ie, first to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven

misconduct constitutes just cause or excuse for the dismissal. In deciding whether the proven misconduct would constitute just cause or excuse, the Industrial Court is fully endowed with the power to consider whether the misconduct proved warrants the punishment of dismissal.

[36] Thus, in reference to the questions posed to us, we are of the view that the Industrial Court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s. 20(3) of the IRA. We are further of the view that the Industrial Court in exercising the aforesaid functions can rely to its powers under s. 30(5) of the IRA based on the principle of equity, good conscience and substantial merit of the case.

[37] Clearly, the reference by the Federal Court in *Milan Auto*'s decision to the "two fold" test, especially the second fold where the Industrial Court has to decide whether the proven misconduct constitutes just cause or excuse for the dismissal is clear reference to the duty of the Industrial Court to apply the doctrine of proportionality of punishment. This is consistent to what is required of the Industrial Court under s. 30(6) in making an award which provides:

> (6) In making its award, the Court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3).

[38] Pertinent to note that, under the IRA itself there is an inbuilt mechanism through Item 5 of the Second Schedule to consider the doctrine of proportionality of punishment. Item 5 provides as follows:

> Any relief given shall take into account contributory misconduct of the workman.

[39] Based on the above, it is clear that the Industrial Court can go on to decide on the relief to be granted by taking into account of contributory misconduct and as such we are of the view that the doctrine of proportionality of punishment is already inbuilt into the IRA. Thus, the Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

[40] As to what is the exact test to be used in deciding whether the proven misconduct constitutes a just cause or excuse for dismissal is a non-issue. Whether it is the reasonable employer's test as adopted by *British Leyland* or the reasonable man test as laid down by the Federal Court in *Hong Leong Assurance*, the Industrial Court's decision on that issue is always open to judicial review.

[41] It is trite law that the decision of the Industrial Court is susceptible to judicial review on the grounds of "illegality", "irrationality", "procedural impropriety" and possibly "proportionality" under which the courts are clothed with powers to scrutinise the decision not only for process but also for substance. (See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147). Decided cases after *Rama Chandran* had clearly established that where the facts do not support the conclusion arrived at by the Industrial Court or the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, such findings are always amenable to judicial review (see *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79; *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1998] 3 CLJ 288; *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625 and *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629).

[42] With all the above discussed principles in mind, let us now proceed to examine whether the decision of the Industrial Court in finding the act of the appellant in not declaring in writing that he was serving as a Managing Director of another company was a minor misconduct which did not warrant a dismissal, is a reasonable decision in the circumstances of the case. We are of the view that the Industrial Court had directed its mind only to factors favouring the appellant, disregarding the very important consideration that the appellant was holding the position as a Special Assistant to the Chairman of the respondent and the

appellant's misconduct had destroyed the trust and confidence that the respondent would have placed on him. The fact is that the appellant was dishonest when he declared in writing that he was not serving on the board of directors of any company when he was, in fact, at all material time found to be serving on the board of directors of another company. The appellant had knowingly made a false declaration and with respect, which in our view, in the circumstances and facts of this case is not a minor misconduct, given the fact that the appellant had signed and accepted the code of conduct which clearly stipulates that:

> an employee shall not be employed, engaged or be concerned in any kind of trade or business nor shall he/she serve on the Board of Directors of any other company, while in the employment within the PANZANA GROUP OF COMPANIES. Any exception to this ruling shall have the express approval in writing, of the Group Chief Executive Officer. It was also a term in the Code of Conduct that an employee who contravenes the Group's Code of Conduct shall be liable to stern disciplinary action including termination of employment.

[43] In the circumstances, we find that the Industrial Court had failed to direct its mind to all the matters it should have taken into account, and we are convinced that, had the Industrial Court had those factors in mind it would have reached another conclusion in that the dismissal of the appellant was reasonable. In short, the dismissal of the appellant by the respondent was fair and not unfair.

[44] For the above reasons, our answers to the questions posed is in the affirmative. However, on the facts and circumstances of this case the appeal is dismissed. As the parties are not asking for costs, we make no order as to costs.